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**MEDIATOR NEUTRALITY AND THE FAIR SETTLEMENT OF DISPUTES**

**STRUCTURED ABSTRACT:**

***Purpose:***

Explores the appropriate role and approach of mediators and investigates whether mediator neutrality and party autonomy should prevail over mediators' obligations to remain neutral where non-intervention would result in unfair settlements.

***Methodology:***

Arises from polarising and paradoxical opinions of the legitimacy of mediator intervention. This paper relies upon theories proposed in peer-reviewed journals, together with secondary data.

***Findings:***

Mediator neutrality has no consistent or comprehensible meaning and is not capable of coherent application.

Requirements for mediator neutrality encourage covert influencing tactics by mediators which itself threatens party autonomy.

Mediator intervention ensures: (a) ethical and moral implementation of justice; (b) removal of epistemological implications of subjective fairness; (c) compensation for lack of pure procedural justice in the mediation process.

Party autonomy requires mediators to intervene ensuring: (a) parties adequately informed of the law; (b) equal balance of power.

***Research Limitations:***

Peer-reviewed journals and secondary data giving meaningful insight into perceptions, opinions and beliefs concerning mediator neutrality, party autonomy and fair outcomes. This data comprised of unstructured-interviews and questionnaires containing 'open-ended' questions.

***Practical Implications:***

Mediator neutrality and party autonomy are less important than fair settlements.

***Social Implications:***

Mediator neutrality should be given a contextual meaning;

Mediation should be more transparent affording the parties opportunity to select a particular type of mediator;

Transformative and narrative approaches to mediation should be further developed.

**KEYWORDS:**

Mediator; Neutrality; Party autonomy; Fair settlement; Intervention; Justice

**INTRODUCTION**

Neutrality on the part of the mediator and the principle of party autonomy are regarded by many as being indispensable requirements of the mediation process (Douglas, 2012, p.19-20). It is contended that mediator neutrality informs the ideology of mediation such that mediation cannot exist in its absence (Zamir, 2011, p.467). Many have endeavoured to define the meaning of mediator neutrality (Exon, 2008, p.578) but, given that neutrality is an elusive concept, the meaning attributed to the term is far from clear (Becker, 2013, p.7). Furthermore, the concepts of mediator neutrality and party autonomy, in their purest form, prohibit mediator intervention even in circumstances where the objective of such intervention

is to ensure a fair settlement as between the parties (Zamir, 2011). Unsurprisingly, there is much debate as to whether the principles of mediator neutrality and party autonomy should remain a requirement of the mediation process. Accordingly, the aim of this research paper is to address the appropriate role and approach of the mediator, in particular, whether safeguarding mediator neutrality and party autonomy is more important than ensuring a fair settlement.

## PART ONE: WHAT IS MEANT BY MEDIATOR NEUTRALITY?

There are countless definitions afforded to the concept of mediator neutrality and equally as many criticisms of those definitions (Mayer, 2011, p.860). Neutrality is a difficult concept to delineate as its meaning is context dependant (Mayer, 2011, p.860). Further, the concept can engender adverse connotations and, accordingly, Mulcahy (2001, cited in Noone and Ojelabi, 2014, p.164) opines that the concept is synonymous with “invisibility” and “passivity”. In contrast, mediator neutrality is frequently considered a prerequisite to establishing respect and integrity in the mediation process (Izumi, 2010, p.77-78). Further, while neutrality may be comparable with the concepts of fairness, justice, impartiality and lack of bias, it is not *entirely* analogous with those concepts (Izumi, 2010, p.78).

Astor (2007, p.223-225) identifies three elements that are comprised within the concept of neutrality. He states that the first element is the requirement for the mediator to refrain from *influencing* the content and/or outcome of the mediation as the mediator’s role is to facilitate a procedure whereby the parties decide how the dispute is to be resolved. Further, Astor contends that the second element of neutrality is the *consensual decision-making* by the parties, while the third element is *non-bias* on the part of the mediator such that the mediator treats the parties *equally* and abstains from *favouring* one party over the other.

Cobb and Rifkin (1991, p.41-46) conducted research into the practice of mediator neutrality by undertaking ‘open-ended interviews’ with 15 mediators and they concluded that there are two competing components of neutrality, namely *impartiality* and *equidistance*. Cobb and Rifkin submit that impartiality is akin to the *absence of bias*, whereby the mediator refrains from siding with a particular party. They submit that in order for impartiality to prevail, mediators are to dissociate themselves from both their conscious and unconscious values, feelings and agendas. Further, Cobb and Rifkin assert that equidistance is the requirement for mediators to conserve a *balance of power* between the parties and, therefore, mediators may, in certain circumstances, legitimately favour one side over another as “...neutrality is the active process by which bias is used to create symmetry.” Equidistance is required as mediation ideology incorrectly assumes that each party has the ability to articulate its position and formulate solutions, thereby having equal power and influence in the mediation (Wing, 2009, p.391). Notably however, Becker (2013, p.60), in analysing 86 completed questionnaires (which included both ‘closed’ and ‘open-ended’ questions) found that 73% of mediators believed that the need to address a power imbalance “definitely did not justify a departure from neutrality.” Furthermore, Cobb and Rifkin’s study found that the fundamental difference between impartiality and equidistance is entrenched within the concept of *bias* as impartiality interprets bias as a destructive component while inversely, equidistance construes bias as an affirmative concept provided it is *symmetrical*. In view of the foregoing, Cobb and Rifkin proclaim that impartiality and equidistance are mutually exclusive concepts. In addition to impartiality, non-influence, equidistance and non-bias, the concept of neutrality also evokes a sense of *fairness* and *even-handedness*, both of which refer to the *equal treatment* of the parties by the mediator (Douglas, 2008, p.156).

Douglas (2008, p.143) conducted ten unstructured and in-depth interviews with experienced mediators with the objective of analysing the “...process of meaning creation that participants use to construct their understanding of neutrality...” Douglas found that the

distinction between the *process* of the mediation and its *content/outcome* is relevant to the understanding and application of the concept of mediator neutrality and further, that the requirement for neutrality only permits *procedural intervention* and necessitates content and outcome neutrality. Procedural intervention refers to the mediator *facilitating* and *controlling* the mediation by encouraging dialogue, supporting the parties in identifying the contested issues and developing alternative solutions without the mediator imposing options upon the parties or influencing the content/outcome of the mediation (Bogdanoski, 2009, p.30). Content neutrality is associated with the consensual decision-making by the parties and prohibits mediators from restricting the parties' control over the way in which the dispute is resolved, while outcome neutrality requires the mediator to refrain from promoting either party's interests (Izumi, 2010, p.82). On this analysis, mediator neutrality is safeguarded when intervention is limited to controlling the process, as opposed to controlling the content or substantive outcome (Douglas, 2008, p.153).

**PART TWO: WHAT IS MEANT BY PARTY AUTONOMY?**

Party autonomy is regarded as the prime directive for mediation and this concept is manifested in various ethical codes of practice (Coben, 2004, p.71). The meaning of party autonomy in the context of mediation is *relatively* uncontroversial (when compared to the concept of neutrality) and Douglas (2008, p.148) found that it refers to the participants' control and ownership of the dispute and their capacity to govern the outcome of the mediation. Similarly, Becker (2013, p.10-11) found that party autonomy renders the parties free to determine potential solutions and affords the parties the responsibility to decide the nature of the agreement and the terms therein. Further, Welsh succinctly summarises the concept of party autonomy by stating that it necessitates the disputants being at the epicentre of the mediation process, actively participating in dialogue, creating potential solutions and determining which norms inform the decision-making (2004, cited in Coben, 2004, p.71). Furthermore, Coben (2004, p.68-69) submits that party autonomy is synonymous with party empowerment and self-determination and extends to the very beginning of the mediation process at the point at which the parties *voluntarily agreed* to participate.

The concepts of mediator neutrality and party autonomy "...intricately interface with one another..." as party autonomy is intrinsically dependent upon the mediator's neutrality (Exon, 2008, p.582). Boule et al. submit that party autonomy is the "flip side" of the neutrality principle, as the imposition of one expedites the imposition of the other (2008, cited in, Becker, 2013, p.10-11). Indeed, Becker (2013, p.49) found that the concept of self-determination "...most closely captured..." a mediator's understanding of the concept of neutrality. Accordingly, references within this research paper to mediator neutrality should be interpreted as including a reference to the principle of party autonomy as such principles are, to a large degree, mutually inclusive.

**PART THREE: THE DIFFICULTIES WITH THE CONCEPT OF MEDIATOR NEUTRALITY**

As explicated above, the concept of neutrality is an umbrella term incorporating a variety of concepts and is, therefore, a multifaceted notion which is imprecise, unclear and fluid (Douglas and Field, 2006, p.4). Notwithstanding the uncertainty as to the *exact meaning* of neutrality, the concept itself is riddled with difficulties as the terms used to explain its meaning (namely non-influence, non-bias, even-handedness, impartiality, fairness and equidistance) are, to a large extent, incapable of practicable application. Accordingly, while many mediators (in particular those practicing the facilitative model) regard neutrality as an ethical requisite of the mediation process, they are incapable of articulating *how* neutrality actually functions in practice (Douglas and Field, 2006, p.4).

### **(a) Mediator Influence**

The concept of mediator neutrality presupposes that the mediator is able to facilitate the mediation process without imposing their own ideological predispositions upon the content/outcome, however, in practice, the boundary between facilitating the process and determining the content/outcome is indistinct (Bogdanoski, 2009, p.33). Accordingly, Becker (2013, p.20) submits that mediator neutrality is a fallacy as the slightest action, or inaction, will affect the outcome of the dispute and the nature of the settlement and, therefore, mediator influence is unavoidable. Mayer (2011, p.861) explains that simple body language, such as affording one party more eye contact than the other, or allowing one party to vocally express themselves at greater length, are actions capable of promoting one party's interests over the other. Similarly, Cobb and Rifkin (1991, cited in Wing, 2009, p.397) found that, in over 80% of its case studies, the party who was permitted by the mediator to present its argument first delineated the content of the settlement agreement. Although, Garcia et al. (2002, p.224), who observed and analysed the video-types from 30 mediations, found that this particular bias *may be overcome* if the parties themselves decided who would present its argument first, thereby avoiding feelings of unfairness.

### **(b) Non-bias and Impartiality**

Defining neutrality using the concepts of impartiality and non-bias is erroneous as it is unfeasible to expect mediators wholly to dissociate themselves from their emotions, beliefs, and values (Rock, 2006, p.153) and the mediators' actions and decisions in connection with the process will invariably be guided by such feelings (Douglas and Field, 2006, p.9). Similarly, Douglas (2012, p.25) submits that *all* interventions (or non-interventions as the case may be) by the mediator are founded upon the mediator's internal perceptions and opinions and, accordingly, a mediator cannot be regarded as non-biased or impartial and will inexorably seek to influence the outcome of the mediation. Furthermore, Garcia et al. (2002, p.223) found that legitimate mediator techniques, such as summarising the parties' positions, are capable of creating a *perception* of bias.

While the absence of internal neutrality only becomes a concern when it is externalised in the mediator's actions or in-actions, it is contended that the mediator's awareness of its own internal emotions, values and agendas can help dispel external bias behaviour (Rock, 2006, p.349-353). Accordingly, while internal neutrality is unattainable, external neutrality can be achieved if the mediator is able to recognise and suppress its own psychological processes and emotional reactions (Rock, 2006, p.349-353). Although, even if the mediator was cognisant of such internal bias, he/she may "overcompensate for less-than-impartial feelings" thereby promoting the interests of the party which it is less sympathetic towards (Mayer, 2011, p.863). Moreover, if such emotions, values and agendas are within the mediator's *unconsciousness*, mediator neutrality would necessitate the paradoxical monitoring by the mediator of an indecipherable psychological process (Rock, 2006, p.359).

### **(c) Even-handedness and Fairness**

Douglas (2008, p.144) found that defining mediator neutrality using the concept of even-handedness is misguided and asserts that the equal treatment of parties by the mediator can engender unequal and unfair outcomes due to the fact that disputants are seldom equal prior to commencing mediation as, for example, one party is likely to be more influential and knowledgeable than the other. Similarly, Astor (2007, p.226-236) submits that the expectation for a mediator to be both fair and neutral is a contradiction as fairness requires



the mediator to actively re-balance power between the parties. By way of example, Wing (2009, p.398) avers that allowing an equal amount of time to each party to present its argument can privilege the party whose position is more easily understood. Further, the obligation upon the mediator to act fairly extends only to the mediation *procedure* and does not include an obligation to ensure a substantively fair settlement agreement (Shimokaji, n.d, p.5 and p.13). It is submitted that such differentiation renders the obligation to act fairly as somewhat ambiguous.

**(d) Equidistance**

Cobb and Rifkin (1991, p.44-46) submit that, in order to practice equidistance, the mediator must represent the interests of one party over the other which necessarily compels the mediator to act in a biased manner thereby violating an integral component of mediator neutrality and party autonomy. Although, Kolb (cited in Cobb and Rifkin, 1991, p.44-46) suggests that this type of bias can be differentiated from the “negative psychological phenomenon”. Further, Astor (2007, p.227-229) submits that when mediators treat parties differently in order to re-balance power, they rely upon their own assessments which are invariably dependent upon their own values and perceptions. Therefore, in honouring the equidistance element of neutrality, the mediator indirectly imposes upon the parties (in the absence of any guidance) its own values and perceptions. Moreover, being able to effectively recognise complex power relations is difficult, if not impossible, for even the most experienced mediator (Bogdanoski, 2009, p.34).

**PART FOUR: INFLUENCING A FAIR SETTLEMENT**

It is contended by Hyman & Love (2002, p16) that an *objectively fair settlement* is one that reflects the result which would have been achieved had the dispute been litigated (though presumably they mean without the imposition of legal costs). Although, as it is not possible to be certain as to the likely litigated outcome, determining objective fairness is likely to include the mediator's *subjective* perception (Exon, 2008, p.19). Conversely, a *subjectively fair settlement* is one which the parties themselves perceive to be fair, irrespective of an independent standard of fairness or objective assessment.

Mediators should be able to implement whatever tactics and methods of intervention they deem necessary to enable them to facilitate an objectively fair settlement, *provided that*, before the mediation, the mediator *informs* the parties as to his/her intentions and intervention boundaries and the parties are agreeable to his/her proposal (Rick, 2009, p.10). However, in practice, the mediator is unlikely to disclose such intention and it will be assumed by the parties that the mediator will adopt a *facilitative approach* to the mediation. Noone and Ojelabi (2014, p.179) conducted semi-structured interviews with 21 experienced mediators in which participants were asked to identify potential ethical and practical issues in five mediation scenarios. They concluded that *objectively fair settlements* are often facilitated by the mediator employing *covert* strategies in order to address power imbalance and influence the outcome of the mediation.

Noone and Ojelabi (2014, p.187) found that covert mediator strategies included ascertaining whether a party understands its own position and the implications of the potential agreement as such ascertainment can manipulate and direct the party's decision-making. Covert strategies also include tactical questioning and leading inquiries, both of which are capable of guiding the parties to a preferred settlement (Bogdanoski, 2009, p.33). Moore (1996, cited in Coben, 2004, p.76), drawing upon his 12 years of experience as a mediator, concluded that a mediator is able to surreptitiously influence the outcome by: (a) determining the negotiation process; (b) managing the dialogue between the disputants; (c) encouraging the

parties to consider the likely outcome at trial; (d) deciding when offers should be made; and (e) encouraging doubt in order to moderate a party's argument. Similarly, Bogdanoski (2009, p.33) submits that the mediator is able to underhandedly direct and influence particular outcomes as, for example, they can facilitate less opportunity to discuss solutions which they do not favour. In view of the foregoing, it is contended that party autonomy will be unattainable if the myth of neutrality remains as this myth necessitates *clandestine mediator strategy* which undermines self-determination and party empowerment (Coben, 2004, p.77).

Further, as the boundary between facilitating the process and determining the content/outcome is indistinct (Bogdanoski, 2009, p.33), and as the meaning of neutrality is elusive and contentious, it is not possible to satisfactorily ascertain which mediation techniques compromise the concept of mediator neutrality and party autonomy (Becker, 2013, p.10). By way of example, Becker's (2013) study found that mediators were unsure as to whether advising the parties as to the likely outcome in litigation constituted a departure from neutrality.

## **PART FIVE: THE REASONS WHY INTERVENTION IS REQUIRED TO ENSURE A FAIR SETTLEMENT**

There is fierce disagreement as to whether mediators are under an obligation to ensure an objectively fair outcome. The concepts of mediator neutrality and party autonomy, in their purest form, prohibit the mediator from consciously influencing the outcome, whether by employing *covert* tactics or adopting an *overtly* evaluative approach (Noone and Ojelabi, 2014, p.164). Further, Becker (2013, p.63) found that 50% of mediators would not "depart from neutrality in order to promote achieving a fair and just outcome."

Despite the foregoing, and irrespective of the requirements of neutrality and party autonomy, it is contended that mediator intervention to ensure a fair settlement is essential as the mediator is under an obligation to: (a) implement to the rules of justice and discharge moral and ethical responsibilities; (b) remove the epistemological implications of subjective fairness; (c) guarantee party autonomy; and (d) compensate for the lack of pure procedural justice in the mediation process. Furthermore, the submission that safeguarding mediator neutrality and party autonomy are not more important than ensuring a fair settlement is further supported by the fact that the concept of mediator neutrality: (a) has no consistent meaning (as detailed in Part One); (b) is not capable of application (as detailed in Part Three); and (c) encourages the employment by the mediator of covert influencing tactics (as detailed in Part Four).

The forthcoming analysis of the reasons why intervention is required by the mediator to ensure a fair settlement is subject to the fact that mediators express differing views as to whether intervention to ensure a fair outcome constitutes a departure from neutrality and party autonomy (Becker, 2013). Further, it is submitted that if the parties are unrepresented, the mediator's accountability to ensure a fair settlement is greater as legal representatives, when present, are accountable to their client for the outcome of the mediation (Maute, 1990, p.361).

### **(a) The requirements of justice and ethical and moral responsibilities of the mediator**

It is generally accepted that the preservation of justice is an essential requirement for all dispute resolution procedures, and while it is difficult to offer a meaningful explanation as to what justice is, one can often intuitively identify those outcomes which are, by their very nature, 'unjust' (Stulberg, 2005, p.213). Accordingly, Hyman and Love contend that the

*primary role* of the mediator is to facilitate justice by ensuring a fair outcome (2002, cited in Noone and Ojelabi, 2014, p.154). Furthermore, it is submitted that a mediator is under an ethical duty (Shapira, 2013, p.957) and moral obligation (Maute, 1990, p.359) to prevent the parties from reaching an unfair settlement agreement *regardless* of the implications that this may have upon the requirements of mediator neutrality and party autonomy. However, it is contended that the aforementioned requirements of justice and ethical and moral obligations only require the mediator to intervene to ensure that the parties *believe* the agreement to be fair, as opposed to ensuring that the agreement is *objectively fair*, and this contention is explicated in section (b).

**(b) A subjectively fair agreement overrides an objectively fair agreement**

Hyman and Love (2002, p.164-186) contend that the concern is whether the disputants *experienced* a sense of justice in the mediation process and *believe* the outcome to be fair, irrespective of whether the settlement is *objectively* fair. They submit that a party may concede an objectively fair settlement in order to avoid the costs of litigation and/or prevent further stress, and that this may be as important to the party as achieving an objectively fair outcome. Further, Hyman and Love's study also found that the mediation outcome may be perceived as fair by participants if it restored harmony and improved the relationship between the parties. Furthermore, they opine that the perception of fairness is also embodied in the party's experience of the process, such as being treated with dignity and having the opportunity to express their argument. Similarly, advocates of the transformative approach submit that the primary objective of mediation is to restore the inter-party relationship, as opposed to achieving an objectively fair settlement (Harper, 2006, p.599).

However, Stulberg (2005, p.216) raises concerns in connection with Hyman and Love's thesis and is critical of their position as it fails to provide a standard independent of the process against which to assess the fairness of the mediation outcome. Accordingly, he contends that Hyman and Love's thesis raises epistemological and jurisprudential implications as it is "not compelling conceptually or practically" to aver that moral terms, such as fairness and justice, have no objective meaning and, by way of analogy, he states that "we certainly do not believe that it is morally fair to discriminate against women...because a large group of all male individuals agree that such a practice is acceptable".

**(c) Party autonomy compels a fair settlement**

The principle of party autonomy is undermined if the mediator permits a party to negotiate an unfair settlement by reason of its unequal influence and power in the mediation and lack of substantive knowledge and, therefore, the mediator is under an obligation to intervene (despite its obligation to be neutral) in order to re-balance power and provide relevant information. Accordingly, on this analysis, the principle of party autonomy and the requirement for a fair settlement are mutually inclusive.

The participants in the study conducted by Noone and Ojelabi (2014) submitted that the concept of party autonomy required informed decisions, including being informed as to the law, as such knowledge will enable the party to negotiate a fair settlement. As stated by Nolan et al. "...for if the self is unknowing, just what is it determining?" (1996, cited in Coben, 2004, p.80). Further, Stulberg (2005, p.239) avers that the veracity and tolerability of any legal system is founded upon each citizen being knowledgeable of their legal rights and, therefore, a party must possess the relevant legal information when seeking to resolve its dispute in a mediation forum. If the disputants do not appreciate their legal positions, including the likely outcome of litigation, they are unable to make informed decisions and negotiate a settlement which is objectively fair (Maute, 1990, p.362). However, Stulberg



(2005, p.238) states that a fair result does not necessitate the parties having *perfect* information and further, that if both parties were not aware of a particular condition, and such condition would have influenced the negotiations, it does not, in itself, inhibit fairness and such an agreement, while perhaps unfortunate, is not unfair. He also contends that a settlement will only be unfair, and party autonomy will only be compromised, in circumstances where the settlement is *asymmetric* to the correct information and has significantly benefited one party over the other.

In addition, it is submitted that mediator intervention is essential to re-balance the power between the parties and that failure to intervene in such circumstances renders the mediator responsible for: (a) procuring an unfair and exploitative settlement; and (b) preventing the disadvantaged party from exercising its autonomy (Bogdanoski, 2009). Bogdanoski (2009) states that encouraging and supporting a party's autonomy through "...maximising their respective control of the mediation process in relation to one another is a legitimate principle of the mediator's role in the process". Furthermore, in Douglas' study into mediator perceptions of neutrality, it was found that practicing mediators were uncomfortable with restricting their interventions to matters of process in circumstances where one party's autonomy was disadvantaged in terms of influence and power (2012, p.25-26). Although, there may be circumstances where no amount of mediator intervention is able to facilitate a fair settlement for a disadvantaged party who is inarticulate or unable to assert its own interests (Bogdanoski, 2009, p.38).

#### **(d) Pure procedural justice ensures a fair settlement**

The concept of pure procedural justice, pioneered by John Rawls (Legal Theory Lexicon, 2004), is such that there is no independent standard for the assessment of justice and fairness and, therefore, there can be no assessment as to whether a mediation outcome is fair. This is because, on Rawls' analysis, the fair procedure will, by its very nature, *guarantee* a fair outcome and further, the outcome will be fair irrespective of what that outcome *actually* is (Legal Theory Lexicon, 2004). Advocates of the facilitative approach associate procedural justice with substantive justice, and proclaim that ensuring procedural justice will inevitably engender a fair settlement (Noone and Ojelabi, 2014, p.156). Similarly, Maute (1990, p.349) submits that, in theory, mediator accountability as to the outcome is achieved by facilitating a procedurally fair process as a fair process will invariably render the agreement fair. Pure procedural fairness may (theoretically) ensue if: (a) the parties are given the opportunity to express their position; (b) the mediator is even-handed; and (c) the parties are treated with dignity and respect (Welsh, 2004, p.52). Further, Stulberg contends that mediation *could* be regarded as a process of 'pure procedural justice' as it has the "...capacity to address issues of injustice through codes of conduct, through allowing legal representation in the mediation, or through the skills of the mediator" (2005, cited in Noone and Ojelabi, 2014, p.156). On this analysis, and provided that the process was one of pure procedural justice, mediator intervention to ensure a fair settlement is not required.

Alternatively, imperfect and perfect systems of procedural justice are capable of producing outcomes which can, and ought to be, independently assessed as there is no guarantee as to the fairness of that outcome (Stulberg, 2005, p.220). It is submitted that pure procedural justice cannot be present in the mediation process as: (a) mediator influence is inevitable; (b) the boundary between process and content is indistinct; (c) the mediator cannot be free from bias; and (d) even-handedness can engender unfair outcomes (as to which see Part Three). Therefore, mediation, regardless of the attempts to ensure a just procedure, cannot guarantee a fair result. Further, Susskind submits that the fundamental role of the mediator is to facilitate good process, and as good process is intended to yield a good outcome, mediators ultimately have a responsibility to intervene in order to ensure an objectively fair outcome (Mayer et al., 2011, p.816). Similarly, it is contended that it is somewhat illogical to

permit intervention to ensure a fair process yet prohibit decisions to ensure a fair outcome (Shapira, 2013).

**PART SIX: SHOULD THE CONCEPT OF MEDIATOR NEUTRALITY AND PARTY AUTONOMY BE SAFEGUARDED?**

**(a) *Abandonment of the concept of mediator neutrality and party autonomy***

Due to the obligation upon the mediator to ensure a fair settlement (as detailed in Part Five) it seems clear that the concept of neutrality (and, by implication, the concept of party autonomy) should be abandoned. In any event, attempts to safeguard the concept of neutrality are futile as it has no consistent meaning (as detailed in Part One) or coherent application (as detailed in Part Two).

Douglas and Field (2006, p.9) submit that the concept of mediator neutrality should be replaced with the concept of mediator impartiality as impartiality, unlike that of neutrality, permits mediator interventions, provided such interventions are invoked for legitimate reasons. Although, they do acknowledge that such semantic distinctions are not particularly helpful for mediators or disputants. Further, Noone and Ojelabi (2014, p.166) suggest that the abandonment of the concept of neutrality is required in order to permit the mediator to address power imbalances between the parties as such re-balancing cannot legitimately be undertaken under the guise of neutrality. Furthermore, Zamir (2009, p.49) states that neutrality ought to be disregarded as it embodies the two paradoxical concepts of impartiality and care and submits that "...impartiality necessitates a distinction between process and content, whereas care may obligate intervention by a third party, the mediator, in the content of the dispute".

Neutrality ideology is largely embodied within the traditional approaches to mediation, including facilitative and evaluative methodologies (Douglas and Field, 2006, p.6), and these approaches are the most dominantly practiced (Boulle, 2011, cited in Douglas and Field, 2006, p.6). It is submitted that facilitative and evaluative mediators are unable to be neutral as their principal objective is for the mediation to result in a settlement, and, therefore, all their interventions are geared towards solving the dispute (Bogdanoski, 2009, p.31-33). However, the newer approaches to mediation, including transformative and narrative mediation, discard the concept of neutrality in its entirety and value mediator intervention in order to *transform* party relationships and create *alternative and non-adversarial conflict narratives* (Astor, 2006, p.228). Douglas and Field (2006, p.10) state that as the transformative and narrative methodologies acknowledge the inevitable influence of the mediator upon not only the process, but the outcome, they provide a more "theoretically robust" approach.

Alternatively, Bogdanoski (2009, p.35-37) emphasises that many commentators aver that facilitative mediators need to adhere to a theory of neutrality as, while *pure neutrality* may be unattainable in the practical absolute sense, the *perception* of neutrality is crucial. He explains that the resolution of disputes is dependent upon the mediator being *regarded* as neutral, as a party who *believes* the mediator to be biased is likely to withdraw from the process. Further, Astor (2007, p.228) is cynical of disregarding the concept of neutrality as, while he acknowledges that the concept is riddled with difficulties, it still, to some degree, regulates and guides mediation practice. Similarly, Douglas states that the concept of neutrality positively directs the mediator's conduct, irrespective of the dichotomy which exists

(2008, cited in Noone and Ojelabi, 2014, p.163). It is also averred that abandoning the concept of neutrality will result in: (a) loss of trust in the mediator; (b) reduced willingness of the parties to engage in the process; and (c) decreased durability in the agreement as the parties are more likely to feel aggrieved (Becker, 2013).

### **(b) Reformulating the concept of mediator neutrality**

Douglas (2008, p.149) submits that, rather than abandoning neutrality in its entirety, the concept should be *reformulated* in order to give it a *contextual* meaning. This contention is supported by Bogdanoski (2009, p.39) who states that neutrality, in the absolute sense, cannot be present or absent as its meaning is “complex, contextual and contingent” and “has different practical meanings depending on the circumstances of the mediation”. By way of example, he submits that mediator intervention to *re-balance power* and maximise party autonomy should not invariably be regarded as compromising the mediator’s neutrality as such intervention can only be assessed in light of the particular relationship between the parties. Similarly, Boule et al. contend that the concept of neutrality is multifaceted and has “several shades of meaning” depending upon the circumstances encountered during the mediation and it ought to be accepted that “not all elements of neutrality will be present all of the time” (2005, cited in Bogdanoski, 2009, p.39-40). On the above analysis, neutrality ought to be accepted as having multiple meanings, thereby permitting the mediator to make *legitimate interventions* in order to circumvent an unfair outcome. Further, it is submitted that if the concept of neutrality was given this *contextualised* meaning (as opposed to a pure interpretation), the debate as to the absolute meaning of the neutrality, and the implications of mediator intervention, becomes sterile (Douglas, 2012).

This reformulation of the concept of mediator neutrality does appear, *prima facie*, to counter the problems inherent within the meaning and application of the concept, permitting mediator intervention where the objective is to ensure a fair settlement, thereby addressing the implications which arise in the absence of such intervention. Further, a context dependant meaning would arguably permit the mediator to re-balance the power between the participants and provide relevant information should the circumstances so require, thereby bolstering the principle of party autonomy and empowerment. However, Douglas and Field (2006, p.15) contend that “proposals to re-contextualise the concept of neutrality to give it meaning or to re-conceptualise it to make it more relevant to practical issues and realities, are not clear enough to make a sound practical impact.” Indeed, such contextualisation questionably provides an unsatisfactory and overly simplified solution to an exceptionally complex dilemma. Notwithstanding the foregoing, it is submitted that the contextualisation of the concept of neutrality is more palatable than a pure and absolute interpretation.

## **CONCLUSION**

The aim of this research paper was to evaluate the appropriate role of the mediator and, in particular, it sought to answer the question as to whether safeguarding mediator neutrality and party autonomy is more important than ensuring a fair settlement.

Firstly, the evidence demonstrates that the concept of mediator neutrality, in its purest form, has no coherent or comprehensible meaning or consistent application. The inherent difficulties with the concept of neutrality support the conclusion that it ought not to take precedence over mediator intervention to ensure a fair outcome as it is, arguably, nonsensical to preserve a concept which is fundamentally defective. Secondly, the evidence concludes that the requirement of mediator neutrality is often (albeit not always) inferior to the mediator’s obligation to intervene to ensure a fair outcome as such intervention is required in order to: (a) adhere to the rules of justice and discharge moral and ethical

responsibilities; (b) remove the epistemological implications of subjective fairness; (c) guarantee party autonomy; and (d) compensate for the lack of pure procedural justice in the mediation process. Thirdly, this paper also found that the principle of party autonomy is undermined if the mediator permits a party to negotiate an unfair settlement by reason of its unequal influence and power in the mediation and lack of substantive knowledge and, in conclusion, the mediator is under an obligation to intervene (despite its obligation to be neutral) in order to re-balance power and provide relevant information. Accordingly, the concepts of party autonomy and mediator neutrality can, in certain circumstances, be paradoxical. Finally, the evidence indicates that the incessant requirement for the mediator to be neutral encourages the deployment of covert influencing tactics by the mediator which in itself threatens the principle of party autonomy.

In view of the aforementioned findings, the overall conclusion is that safeguarding mediator neutrality and party autonomy is not more important than ensuring a fair settlement. Although, it is acknowledged that the research question is somewhat misleading as it presupposes that the principle of party autonomy and mediator intervention to ensure a fair outcome are mutually exclusive.

Given these conclusions a number of recommendations follow. Firstly, the concept of neutrality ought not to be afforded an absolute and pure interpretation, rather, the concept should be reformulated in order to provide it with a context dependant meaning which would, to some degree, legitimatise intervention to ensure fairness and absolve the difficulties inherent within the pure understanding of the concept. Secondly, the mediation process should be more transparent and the parties should be asked before the mediation commences (either by the mediator or the relevant mediator nominating body) whether they desire the mediator to intervene in circumstances where the mediator believes the agreement to be unfair. If the parties opt for such mediator intervention, the debate regarding mediator neutrality, party autonomy and the requirement of fair outcomes becomes somewhat sterile. Alternatively, if the parties reject such intervention, the mediator would, to a large extent, be justified in permitting an objectively unfair settlement. Finally, mediator training bodies, such as the Centre for Effective Dispute Resolution, should place greater emphasis on the newer approaches to mediation, such as the transformative and narrative approaches, and these newer forms of mediation should be provided to potential parties as an alternative to the traditional approaches. The transformative and narrative methodologies do not insist upon the neutrality folklore as they acknowledge the inevitable influence of the mediator and, therefore, they offer a more legitimate and theoretically robust approach. Accordingly, this research paper recommends that more research into the transformative and narrative approaches to mediation is undertaken so that such approaches can be further developed.

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